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No. 03-1027

Supreme Court, U.S.
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In The
Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN
AS NEXT FRIEND OF JOSE PADILLA,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF AMICUS CURIAE THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	3
ARGUMENT	4
1. The President Had Authority to Seize Padilla as an Enemy Combatant While Padilla Was in Pakistan	5
2. Presidential Authority to Seize Padilla as an Enemy Combatant Remained Intact When Padilla Left Pakistan for the United States	11
3. The President Has Authority to Seize Enemy Combatants Seeking to Enter the United States at the Border	14
4. The Authority of the President to Order the Seizure of Padilla, as an Enemy Combatant, Is Undiminished by the Initial Use of a Material Witness Warrant	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 16

Cannon v. University of Chicago,
441 U.S. 677 (1979) 10

Carroll v. United States,
267 U.S. 132 (1925) 15

Duncan v. Kahanamoku,
327 U.S. 304 (1946) 7

Ex Parte Quirin,
317 U.S. 1 (1942) 9, 10

Hamdi v. Rumsfeld,
316 F.3d 450 (4th Cir. 2003),
cert. granted, 124 S. Ct. 981 (2004) 5, 8, 10, 11

Illinois v. Wolfbrandt,
469 N.E.2d 305 (Ill. App. 1985), *rev'd on other grounds by Daley v. Hett*, 495 N.E.2d 513 (Ill. 1986) 13

In re Territo,
156 F.2d 142 (9th Cir. 1946) 8

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 9

Nebraska v. Goff,
118 N.W.2d 625 (Neb. 1962) 13

Padilla v. Rumsfeld,
352 F.3d 695 (2nd Cir. 2003) 4, 12, 17

United States v. Ramsey,
431 U.S. 606 (1977) 14, 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 15

United States v. Santana,
427 U.S. 38 (1976) 13

United States v. Villamonte-Marquez,
462 U.S. 579 (1983) 15

CONSTITUTION AND STATUTES

U.S. Const. art. II, § 2, cl. 1 8

10 U.S.C. § 956(5) 11

18 U.S.C. § 4001 9

18 U.S.C. § 4001(a) 9

18 U.S.C. § 4001(b) 10

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) 10

CAL. PENAL CODE § 852-.4 (2004) 13

IDAHO CODE § 19-701-07 (2004) 13

IND. CODE ANN. § 35-33-3-1-7 (2004) 13

IOWA CODE § 806.1-.6 (2003) 13

ME. REV. STATE. ANN. tit. 15, § 151-155 (2003) 13

MD. CODE ANN., CRIM. PROC. § 2-304-09 (2003) 13

MASS. ANN. LAWS ch. 276, § 10A-D (2004) 13

MICH. COMP. LAWS § 780.101-08 (2003) 13

MINN. STAT. § 626.65 -72 (2003) 13

MO. REV. STAT. § 544.155 (2004) 13

TABLE OF AUTHORITIES – Continued

Page

NEB. REV. STAT. ANN. § 29-416-420 (2003) 13

N.J. STAT. ANN. § 2A:155-1-7 (2004) 13

N.M. STAT. ANN. § 31-2-1-8 (2003) 13

N.Y. CRIM. PROC. LAW § 140.55 (2003) 13

TENN. CODE ANN. § 40-7-201-05 (2003) 13

VT. STAT. ANN. tit. 13, § 5041-45 (2003) 13

PUBLICATIONS

Andrea Kannapell, *Front Lines*, N.Y. TIMES, June 2, 2002, § 4, p. 2 5

Dan Eggen, *U.S.: 9-11 Mastermind Killed Reporter*, HOUSTON CHRONICLE, Oct. 22, 2003, at A1 6

Germans Swoop on Islamic Group, BIRMINGHAM POST [United Kingdom], April 24, 2002, at 9 6

Indira A. R. Lakshmanan, *Fighting Terror/The Military Campaign; Pakistan Said Still to Aid Al Qaeda*, BOSTON GLOBE, Mar. 25, 2002, at A1 6

James Risen and Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1 12

John W. Wright (ed.), *The New York Times Almanac*, 148-49 (2004 ed.) 1

Philip Shenon and Neil A. Lewis, *A Nation Challenged: Captives; U.S. Says a Key Detainee Had Planned More Attacks*, N.Y. TIMES, April 3, 2002, at A12 ..... 6, 7

INTEREST OF AMICUS CURIAE THE COMMONWEALTH OF VIRGINIA[1]

By ratification of the Constitution and entry into the Union, the people of the fifty States have expressly assigned to the National Government the responsibility and authority to provide for their common defense. Being thus dependent on the National Government for its security, the Commonwealth of Virginia has a vital interest in preserving within that government – and, especially, in the Commander-in-Chief – sufficient authority for waging war vigorously and successfully upon our foes, including the new enemy, Al Qaeda. It is an interest underscored by the September 11 attack on Virginia soil, and by the presence in Virginia of numerous sites – military, economic and symbolic – against which future terrorist attacks might be launched.[2]

At the same time, Virginia remains deeply devoted to preserving the blessings of liberty that have been the hallmark of our national character since the days of our

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[1] Given the expedited briefing schedule, the Commonwealth of Virginia has not sought additional signatories on this brief by circulating it among the States.

[2] Examples of military sites include the Pentagon, Langley Air Force Base (headquarters of Air Force Combat Command), Norfolk Naval Station (headquarters of Atlantic Fleet), Quantico (headquarters of Marine Combat Development Command and Systems Command). *See* John W. Wright (ed.), *The New York Times Almanac*, 148-49 (2004 ed.). Major sites of economic value include Dulles International Airport, Ronald Reagan National Airport, the Metro system, the Chesapeake Bay Bridge-Tunnel, the ports of Hampton Roads and the Newport News shipyard. Sites of notable symbolic value include the many settings associated with our Nation's founding, including Mount Vernon, Monticello, Montpelier and Colonial Williamsburg.

Founders. Thus, notwithstanding the exigencies of today, Virginia remains highly skeptical of any activity that might be used tomorrow to undermine the individual liberties guaranteed to Americans by the Bill of Rights. Our heritage requires nothing less.

Throughout the history of our Nation, two fundamental aspirations have existed in tension with one another. We demand liberty; we expect government to refrain from oppressive intervention in the lives of individual citizens. And we expect security; we demand that our leaders confront and defeat threats against us from our enemies. This case, like others born in difficult times from the tension between these two aspirations, calls for a careful and delicate balance and for the discovery of avenues by which our National Government can effectively protect its citizens from attack, without compromising the individual rights promised them by the Constitution.

Committed to the preservation of both liberty and security, Virginia offers the Court this brief amicus curiae, supporting the United States, albeit with an alternative analysis that would lead to a limited ruling. The court of appeals instructed the district court to issue a writ of habeas corpus directing the Secretary of Defense to release Jose Padilla, an enemy combatant, from military custody. This judgment should be reversed. It is our belief, however, that this case can – and should – be resolved in a manner that upholds the seizure and detention of Padilla without creating a precedent that might – in different times and in different hands – be used in a manner destructive of our liberties.

SUMMARY OF ARGUMENT

The Court should uphold the seizure and detention of Jose Padilla as an enemy combatant. Given the facts of this case, the Court may do so without reaching the difficult constitutional issue of whether the President has authority to seize and detain alleged enemy combatants who are citizens of the United States *and* at-large within the country at the time of their seizure.

First, Padilla is an enemy combatant who was under surveillance by United States officials while in Pakistan, a country which, for purposes of presidential authority, must be considered part of the theater of operations in the war against Al Qaeda. Thus, the President would have been within his authority to order him seized there. Arguably this factor alone would be sufficient to justify his subsequent seizure and detention on American soil; however, given the other facts of this case, it is not necessary to go so far in order to rule in favor of the United States.

Second, while Padilla was not seized within Pakistan, he was followed by officers of the United States government as he sought to return to the United States, a circumstance analogous to "fresh pursuit." Such pursuit forecloses any argument that presidential authority to seize Padilla vanished upon his departure from Pakistan. Moreover, it would make no sense to allow seizure of an enemy combatant while he is still on foreign soil, but to prohibit such seizure when that same combatant leaves that country to bring the war to our homeland.

Third, Padilla was seized while attempting to re-enter the United States at an international airport, a venue that is the functional equivalent of the border, where constitutional rules of search and seizure have long been held to

vest government officials with enhanced authority. Given Padilla's status as an enemy combatant, the fact that he was seized at the border while seeking to re-enter the country should be sufficient to justify presidential authority, even if he had not been in Pakistan or pursued by federal agents during his return from that country.

Finally, while the initial seizure of Padilla was under a material witness warrant, rather than presidential directive, Padilla was never at-large within the country following his return from Pakistan. The authority of the President to seize him as an enemy combatant is undiminished by the initial use of an alternative method of seizure.

ARGUMENT

When this case came before the court of appeals, the question decided was a broad one – whether the President possesses authority "to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat." *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2nd Cir. 2003) (Pet. App. 2a). A similarly broad question is now before this Court. *See* Pet. for Cert. at I. While the Court may choose to give an equally broad answer, Virginia writes to point out that the Court need not do so. The Court may – and should – uphold the seizure and detention of Padilla on the narrower grounds suggested by the particular facts of this case.

1. The President Had Authority to Seize Padilla as an Enemy Combatant While Padilla Was in Pakistan.

The war on terror is unlike any other conflict that our Nation has confronted. It is a conflict "waged less against nation-states than against scattered and unpatriated forces." *Hamdi v. Rumsfeld,* 316 F.3d 450, 464 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004). Yet, "neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the war-making authority entrusted to the executive and legislative branches." *Id.* In such a conflict, it is difficult to define exactly where the theater of operations begins and where it ends. However, to the extent that any such distinction may remain legally relevant, the country of Pakistan must be considered part of the theater of operations in the war with Al Qaeda.

Pakistan is, of course, geographically adjacent to Afghanistan, where the United States fought and removed the Taliban regime that gave Al Qaeda a haven for its operations. In the spring of 2002, the United States government advised that "the top leadership of Al Qaeda and as many as 1,000 non-Afghan fighters [were] regrouping in northwestern Pakistan, in the lawless tribal area just over the border with Afghanistan."[3] At the same time, Pakistan advised that "Qaeda leaders have filtered into its cities, and that the terror network's next phase of the

[3] Andrea Kannapell, *Front Lines*, N.Y. TIMES, June 2, 2002, § 4, p. 2.

conflict may center on Pakistan.'"[4] Among the Al Qaeda leaders who moved their operations into Pakistan were Osama Ben Laden, head of the terrorist organization;[5] Khalid Sheik Mohammed, an ethnic Pakistani believed to have masterminded the attacks of September 11;[6] as well as Abu Zubaydah, the Al Qaeda chief of military operations.[7]

Captured inside Pakistan in March 2003, Khalid Sheik Mohammed was later identified by United States officials as the person seen on videotape executing Wall Street Journal reporter Daniel Pearl, in Pakistan, in January 2002.[8] Zubaydah was captured inside Pakistan on March 28, 2002, in a raid conducted by Pakistani police in

[4] *Id. See also* Statement of Gen. John Abizaid, U. S. Army Central Command, to the House Armed Services Committee, Mar. 3, 2004 (noting that Pakistan is "where many Al Qaida and Taliban leaders and forces settled following major combat operations in Afghanistan" and that Pakistan is among the states in the region "most vulnerable to extremism" by organizations seeking to "indoctrinate the youth to violent Jihad as the principle means of advancing their cause.")

[5] *See, e.g.,* Indira A. R. Lakshmanan, *Fighting Terror/The Military Campaign; Pakistan Said Still to Aid Al Qaeda*, BOSTON GLOBE, Mar. 25, 2002, at A1 (quoting the post-Taliban Afghan government as "100 percent sure" that Osama Ben Laden fled into Pakistan); *Germans Swoop on Islamic Group*, BIRMINGHAM POST [United Kingdom], April 24, 2002, at 9 (reporting that Osama Ben Laden is "thought to be safe in Peshawar, [Pakistan], where he remains a hero to most people.").

[6] Dan Eggen, *U.S.: 9-11 Mastermind Killed Reporter*, HOUSTON CHRONICLE, Oct. 22, 2003, at A1.

[7] Philip Shenon and Neil A. Lewis, *A Nation Challenged: Captives; U.S. Says a Key Detainee Had Planned More Attacks*, N.Y. TIMES, April 3, 2002, at A12.

[8] Dan Eggen, *U.S.: 9-11 Mastermind Killed Reporter*, HOUSTON CHRONICLE, Oct. 22, 2003, at A1.

conjunction with agents of the Central Intelligence Agency and the Federal Bureau of Investigation.[9] At the time of his capture, Zubaydah was "organizing new attacks on U.S. targets," according to U.S. officials.[10] Thus, at least in late 2001 and well into 2002, if not currently, Pakistan must be regarded as part of the theater of operations for this unusual war against a terrorist network.

It was later determined that one Al Qaeda plan being orchestrated by Zubaydah involved Padilla. Early in 2002, it was Zubaydah who directed Padilla to "travel[] to Karachi, Pakistan to meet with senior Al Qaeda operatives to discuss Padilla's involvement and participation in terrorist operations targeting the United States . . . [including] the noted 'dirty bomb' plan . . ." Mobbs Declaration, ¶ 9 (Pet. App. 170a). At the time Zubaydah was captured, several other Al Qaeda operatives were captured as well.[11] Padilla was not among them. Yet, whether among the operatives seized at Zubaydah's capture, or tracked down later, there is no doubt that he could have been seized as an enemy combatant in Pakistan, notwithstanding his United States citizenship.

Because Pakistan was part of the theater of operations, the President had full authority under United States law to seize any enemy combatant who was present in that country. *See Duncan v. Kahanamoku,* 327 U.S. 304, 313-14 (1946) (there is a "well-established power of the

[9] Philip Shenon and Neil A. Lewis, *A Nation Challenged: Captives; U.S. Says a Key Detainee Had Planned More Attacks*, N.Y. TIMES, April 3, 2002, at A12

[10] *Id.*

[11] *Id.*

military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war."). "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front. . . ." *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

More importantly, the fact that Padilla was blessed with United States citizenship does not change the result. "One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." *Hamdi*, 316 F.3d at 475.[12] This is so for three reasons: First, the President, in the exercise of his authority as Commander-In-Chief, U.S. Const. Art. II, § 2, cl. 1, can seize any enemy combatant, including those who are United States citizens, when they are *outside* the United States.[13] *See Hamdi*, 316 F.3d at 475 ("At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there."). As this

[12] Of course, the fact that Padilla is an American citizen means that he is entitled "to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches." *Hamdi*.

[13] Because one who is seized at the border may be deemed outside the United States, this Court need not address the more troublesome issue of whether the President can seize an enemy combatant, who is also a United States citizen, within the United States. *See infra* at 14. Thus, *both* Padilla and Hamdi were outside of the United States when they were seized.

Court explained more than sixty years ago, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency." *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

Second, contrary to the reasoning of the court below, the Non-Detention Act, 18 U.S.C. § 4001, does not limit the President's authority to seize enemy combatants who also happen to be U.S. citizens.[14] *Hamdi*, 316 F.3d at 467-68. A statute must be read in its entirety. *See, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (noting "the cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context"). Although the first subsection of the Non-Detention Act purports to require congressional authorization to seize U.S. citizens, 18 U.S.C. § 4001(a), the remaining subsection makes it clear that the act is limited to the seizure and incarceration of civilians and

[14] The Non-Detention Act provides:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended[,] and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. § 4001.

does not extend to enemy combatants. *See* 18 U.S.C. § 4001(b) (discussing the control and management of federal penal institutions). Indeed, the remaining subsection, by its very terms, explicitly excludes "military and naval institutions" such as the facility where Padilla is being held from the scope of the Non-Detention Act. *See* 18 U.S.C. § 4001(b)(1). Moreover, when Congress enacted the Non-Detention Act in 1971, it surely knew of this Court's 1942 decision in *Quirin*. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 699 ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with . . . important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."). "If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi*, 316 F.3d at 468.

Third, even if the Non-Detention Act were otherwise applicable, Congress has subsequently authorized the President to seize enemy combatants who are also United States citizens. Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." *Authorization for Use of Military Force,* Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). As the Fourth Circuit noted, "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed

against our troops." *Hamdi*, 316 F.3d at 467. Additionally, Congress has provided funds for the housing and care of persons "similar to prisoners of war." 10 U.S.C. § 956(5). "It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Hamdi*, 316 F.3d at 467-468.

In sum, this Court need not resolve all the fine points of the interplay between the inherent powers of the Commander-in-Chief, the Due Process Clause, the Non-Detention Act and the 2001 Authorization for Use of Military Force. What is plain is that the President had authority to seize Padilla as an enemy combatant while Padilla was in the country of Pakistan.

2. Presidential Authority to Seize Padilla as an Enemy Combatant Remained Intact When Padilla Left Pakistan for the United States.

As Virginia has shown, the President had authority to seize Padilla as an enemy combatant while he was in Pakistan. Under the facts of this case, this authority did not vanish when Padilla left Pakistan en route for the United States. Surely, it would defy common sense to conclude that there was authority to seize him as long as he remained in Pakistan, merely planning an attack against the United States, but that the authority evaporated as soon as he left that country and headed toward his target on a mission of "reconnaissance and/or other attacks on behalf of Al Qaeda." Mobbs Declaration, ¶ 10 (Pet. App. 170a).

Additional support for continuation of presidential authority can be found, by analogy, in the common law doctrine of "fresh pursuit." Broadly speaking, this doctrine enlarges the authority of an officer so as to permit him to seize a suspected felon who has traveled outside the geographic borders by which the officer's authority is ordinarily bounded. Thus, even if the President's authority to seize Padilla as an enemy combatant were ordinarily limited to the theater of operations (an issue the Court need not decide), Padilla's departure from Pakistan does not necessarily defeat the authority of the President to seize him. This is especially so given that the time between Padilla's departure from Pakistan and his seizure at O'Hare International Airport was only a matter of hours, not weeks. *See Padilla*, 352 F.3d at 699 (Pet. App. at 4a) (noting that "[o]n May 8, 2002, Jose Padilla . . . flew . . . from Pakistan, via Switzerland, to Chicago"). Such a period is not so long as to dissipate the freshness of the pursuit. It is also worth noting – though not critical to the fresh pursuit analogy – that federal agents physically followed Padilla during his journey back to the United States.[15]

This conclusion is not altered by the fact that the pursuit of Padilla was undertaken in a manner calculated not to alert him prematurely to the presence of federal agents. The doctrine of fresh pursuit does not require the

[15] *See* James Risen and Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1 (noting that F.B.I. agents secretly boarded Padilla's flight from Zurich to the United States to keep him under surveillance).

officer who leaves his jurisdiction to set up a hue and cry or otherwise warn his quarry that he is being pursued. *See Illinois v. Wolfbrandt*, 469 N.E.2d 305, 310 (Ill. App. 1985) (rejecting argument "that there was no fresh pursuit because [defendant] was not fleeing from his pursuers, and in fact, he was never aware of the officers behind him.") (applying Missouri Fresh Pursuit Law), *rev'd on other grounds by Daley v. Hett*, 495 N.E.2d 513, 516 (Ill. 1986).[16] Indeed, in pursuing terrorists across

[16] Additionally, sixteen States have adopted the Uniform Act on Fresh Pursuit, codifying the common law authority of an officer to pursue a suspect outside of the officer's jurisdiction. None of those statutes have defined "fresh pursuit" to require knowledge by the suspect that he is being pursued. *See* CAL. PENAL CODE § 852-.4 (2004); IDAHO CODE § 19-701-07 (2004); IND. CODE ANN. § 35-33-3-1-7 (2004); IOWA CODE § 806.1-.6 (2003); ME. REV. STATE. ANN. tit. 15, § 151-155 (2003); MD. CODE ANN., CRIM. PROC. § 2-304-09 (2003); MASS. ANN. LAWS ch. 276, § 10A-D (2004); MICH. COMP. LAWS § 780.101-08 (2003); MINN. STAT. § 626.65 -72 (2003); MO. REV. STAT. § 544.155 (2004); NEB. REV. STAT. ANN. § 29-416-420 (2003); N.J. STAT. ANN. § 2A:155-1-7 (2004); N.M. STAT. ANN. § 31-2-1-8 (2003); N.Y. CRIM. PROC. LAW § 140.55 (2003); TENN. CODE ANN. § 40-7-201-05 (2003); VT. STAT. ANN. tit. 13, § 5041-45 (2003). *But see*, *Nebraska v. Goff*, 118 N.W.2d 625 (Neb. 1962) (rejecting application of fresh pursuit statute when, *inter alia*, the suspect was unaware he was being pursued and was not seeking to avoid arrest).

A rule that the suspect must be aware of the pursuit could conceivably apply where the pursuit is not across a border, but into a private residence, a venue afforded special protection based on privacy concerns. *See United States v. Santana*, 427 U.S. 38, 43 (1976) (noting that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place" and explaining that, in such a context, " 'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry in and about [the] public streets."). Of course, Padilla was seized at an airport, not inside a home, and no purpose would have been served by alerting him to the fact he was on the verge of being apprehended.

international borders, where diplomatic considerations introduce complexities not present in a more domestic context, the need for discretion can be especially compelling.

In sum, once Padilla was subject to seizure as an enemy combatant in Pakistan, he continued to be subject to seizure at every point along his route back to O'Hare International Airport. The authority of the President to seize him was not in any way reduced or eliminated by his movement out of one jurisdiction and into another.

3. The President Has Authority to Seize Enemy Combatants Seeking to Enter the United States at the Border.

The Court may decide the case before it – and uphold the power of the President to seize and detain Padilla – by focusing simply on the fact that Padilla is an enemy combatant captured while attempting to enter the United States at the end of an international flight. Whatever rules may apply to the detention of United States citizens who are seized while at-large within the country, those same rules need not apply to those who are seized while attempting to enter the country at the border.

This Court has long recognized that constitutional rules governing searches and seizures apply differently at the border than they do elsewhere within the country. As this Court explained in *United States v. Ramsey*, 431 U.S. 606, 616 (1977):

> That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur

> at the border, should, by now, require no extended demonstration.

This principle has been applied to justify a wide range of government actions, including actions that would draw condemnation if undertaken within the interior of the country. For example, in *Carroll v. United States*, 267 U.S. 132, 153-54 (1925), this Court said:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Similarly, this Court has ruled that automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity. *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976). Likewise, boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). It is not just those traveling by land or sea who are subject to "the longstanding right of the sovereign to protect itself."

Ramsey, 431 U.S. at 616. Those traveling by air are subject to the same right. For a person arriving in the United States on a flight from abroad, the airport is the functional equivalent of the border. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). *See Ramsey*, 431 U.S. at 616 (defendant arriving at Los Angeles International Airport on direct flight from Bogota, Colombia, treated as if she were crossing an international boundary). Thus, when Padilla flew into O'Hare International Airport, the tarmac on which the plane landed may have been American soil, but Padilla's status was no different than if he were presenting himself for entry at a checkpoint on the Mexican or Canadian border.

The point here is not to suggest that Padilla was arrested for violating an immigration or customs statute, nor does the Commonwealth suggest that immigration or customs searches are the same as the seizure of an enemy combatant. The point is simply that, in keeping with well-established precedent, government actions taken at the border for the purpose of protecting the country are subject to more lenient rules than actions taken in the interior. Thus, the Court need not decide whether the President has a *general* power to detain, as an enemy combatant, a United States citizen seized on American soil. It need only decide that he has the power to seize such an enemy combatant when he is seeking to re-enter the country.

In other words, assuming *arguendo* that the Commander-in-Chief may have greater authority *outside* the country than he has *inside* it, the border need not be treated as if it were on the inside. For the purpose of regulating the seizure and detention of enemy combatants, the border may just as easily be treated as part of the

outside or, at the very least, as a venue falling into a special category of its own. Indeed, given his proximity to the homeland, an enemy combatant seeking to cross the border from abroad is likely to be even more dangerous than he was when he was yet an ocean away. Thus, in the interplay of various constitutional and statutory provisions, the President's authority should be deemed broad enough to justify the seizure and detention of Padilla.

4. The Authority of the President to Order the Seizure of Padilla, as an Enemy Combatant, Is Undiminished by the Initial Use of a Material Witness Warrant.

When Padilla arrived at O'Hare International Airport on May 8, 2002, he was not initially seized by order of the President. He was seized and held by federal marshals, acting pursuant to court order, as a material witness in connection with grand jury proceedings investigating the September 11 attacks. *Padilla*, 352 F.3d at 699 (Pet. App. at 4a). Padilla was thereafter held in custody *continuously* by the Department of Justice through June 9, 2002, when he was turned over to the Department of Defense as an enemy combatant pursuant to presidential order. *Id.* at 699-700 (Pet. App. at 4a-6a).

In other words, following his return from Pakistan, Padilla never achieved full and free entry into the United States and thus, was never at-large within the country. His situation is, therefore, distinguishable from the case of someone who never left the country to consort with Al Qaeda, or who, having left the country, successfully re-entered and returned to the freedom of our streets. These other, hypothetical situations may present questions more difficult than the one presented by the case at hand.

However, such hypothetical questions need not be answered in order to affirm the authority of the President – under the facts of this case – to seize and detain Padilla as an enemy combatant. Because Padilla was in federal custody without interruption, beginning with his seizure at the airport, and because his initial seizure was also related to Al Qaeda activities, the President's June 9 order directing the seizure of Padilla as an enemy combatant "relates back" to the time and place of the airport seizure.

To hold otherwise would split hairs too finely. It would unreasonably restrict the war powers needed by the President to provide for the common defense while doing nothing to protect citizens at-large against any potential abuse of those powers. Indeed, to rule that the power to seize Padilla as an enemy combatant does not relate back to his initial detention may even invite increased use of presidential power. The initial seizure of Padilla as a material witness gave the President time to make a careful, informed and personal judgment about whether Padilla should be held as an enemy combatant. To deprive the President of this time could easily lead to hastier judgments and/or to a delegation of the President's authority to officials closer to the scene, but farther removed from public accountability.

In short, the authority of the President to order the seizure of Padilla, as an enemy combatant, is undiminished by the initial use of a material witness warrant. He was properly seized and is properly detained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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